Supreme Court, U.S.
FILED

95 • 623 OCT 16 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

HUBBARD LEROY WALKER,

Petitioner,

versus

STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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80 pp

QUESTIONS PRESENTED

Did the Court of Appeals for the Seventh Circuit effectively deny the Petitioner an appeal when it: failed or refused to address the issues before it; ratified a district court's blatant disregard of Supreme Court authority by upholding an employer's undisputed, repeated use of the admitted racial stereotypes of *mental deficiency* and *oversexed-black-male* to justify discharge of a black probationary state trooper in spite of his admittedly satisfactory performance; disregarded the employer's documentary evidence, judicial admissions, and the lower court's own dispositive findings; and diverted the issues before it by labeling the district court's findings as credibility findings when they were not?

Must this Court therefore grant summary reversal to uphold the integrity of Title VII of the Civil Rights Act as interpreted by the Supreme Court of the United States?

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OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished *per curiam* Order issued June 20, 1995 and is reproduced in the Appendix (App. 1). The unpublished Order of the Court of Appeals denying Petitioner's petition for rehearing *en banc* was issued July 18, 1995 and is reproduced in the Appendix (App. 45). The Judgment and Entry of the District Court entered July 13, 1994 were not published and are reproduced in the Appendix (App. 35). The Magistrate's Report of Evidentiary Hearing, Recommended Findings of Fact, Conclusions of Law and Proposed Judgment entered April 14, 1993 were not published and are reproduced in the Appendix (App. 9).

JURISDICTION

The Order of the Court of Appeals was entered on June 20, 1995. The Order denying Petitioner's petition for rehearing with suggestion for rehearing *en banc* was entered on July 18, 1995. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

This action is based on Title VII of the Civil Rights Act of 1964, as amended in 1972, which provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) . . . to discharge any individual, or otherwise to discriminate against an individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,. . . .

42 U.S.C. Section 2000e 2(a).

STATEMENT OF THE CASE[1]

All of the facts set out below were established at trial by judicial admissions including stipulations, requests for

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[1] Abbreviations used in this brief are as follows:

ISP	–	Indiana State Police
App	–	Appendix followed by page number
RA	–	Plaintiff's Request for Admission and response admitted into evidence followed by number
Stip	–	Stipulations of parties followed by number
DX	–	Defendants' exhibit followed by number
PX	–	Plaintiff's exhibit followed by number
Report	–	Magistrate's Report of Evidentiary Hearing, Recommended Findings of Fact, Conclusions of Law and Proposed Judgment filed April 14, 1993 followed by Appendix page number (App. ___)
Tr. Vol.	–	Trial transcript, followed by Volume and page number. For the testimony of John Jeffries, Thomas Kough Vol. II, John Liell and Larry Furnas all of which had been transcribed earlier, the court reporter inserted that testimony into the transcript by reference without reprinting those pages. Those citations will read as Tr. Vol., p.___, witness name p.___ from original transcription.

admission, and admissions against interest of a party, or by undisputed documentary evidence.

The Indiana State Police (ISP) discharged Probationary Trooper Hubbard Leroy Walker (Walker) in July 1977, in the thirteenth month of his probation.

In Walker's final evaluation made July 1, 1977, immediately prior to his discharge, the ISP rated Walker's performance as overall satisfactory, and the ISP's counsel, in oral argument before the Seventh Circuit panel, admitted that Walker's performance was essentially satisfactory. (PX 6b App. 49) Walker had recently scored eighty-six percent (86%) on the written end-of-probation test which tested all aspects of the police function. A passing grade was seventy percent (70%). (RA 375; ISP Captain Kough Tr. Vol. V, p. 77)

The ISP stated that Walker was discharged based upon evaluations containing the repeated use of the racial stereotype of *mental deficiency*. (PX 4, 5, 18a; RA 26, 27, 28) Additionally, the district court found a complaint solicited by the ISP after the extension of Walker's probation and filed against Walker in June 1977, which the ISP's expert testified contained the stereotype of *oversexed-black-male*, was used to justify the discharge. (Report App. 22; RAs 386, 388; Stip 98, 387, 412; PX 10i; Tr. Vol. V, p. 3 Leill p. 21) The ISP also used the *oversexed-black-male* stereotype in early training evaluations and again in May and July 1977 in support of the extension of probation and discharge respectively. (PX 4, 5, 18a)

Walker met all the requirements for admission to the police academy (Stip 110), entered the academy on March

1, 1976, and graduated from the academy on June 13, 1976. (Stip 111)

Walker was the first black state trooper assigned to Evansville, Indiana. His wife was white, and this fact was known to the Evansville command. (Report App. 15, 16; Stip 190; RA 199) The ISP had not provided training for the white officers or information to the public concerning the integration of Blacks under a Consent Decree mandating racial integration of formerly racially segregated commands, including Evansville. (Stip 178; Tr. Vol. III, pp. 13, 73)

Sergeant Ed Lunkenheimer was Walker's immediate supervisor from the time the ISP commissioned Walker until his discharge. Negative criticism in Sgt. Lunkenheimer's written evaluations of Walker until the summary evaluation of May 25, 1977 in support of an extension of Walker's probation, rely wholly on the stereotype of *mental deficiency* identified by the ISP's own expert, Dr. John Liell. (PX 4, 5, 6a, 18a; Tr. Vol. V, p. 3 Liell pp. 9-10, 12-13, 14-15) The *mental deficiency* stereotype appears explicitly no fewer than 20 times in no fewer than nine of the regular and summary evaluations of Walker. (PX 4, 5, 6a, 18a, 9c) The exact words used are:

06/13/76-08/30/76 Walker's mental capacity is below that of an Indiana State Trooper.

* * *

. . . lacks mental ability . . .

* * *

	. . . he is hampered by his lack of mental ability. . . .
	* * *
	His mental capacity . . . is . . . below that required of an Indiana State Trooper.
09/18/76-09/22/76	He has the initiative but is hampered by a lack of self-confidence due to his mental ability.
	* * *
	He is hampered by lack of self-confidence due to his mental ability.
10/01/76-10/31/76	He has the initiative but is hampered by a lack of self-confidence due to his mental ability.
	* * *
	He is hampered by lack of self-confidence due to his mental ability.
12/01/76-12/31/76	It is questionable whether he has the mental ability to comprehend at times.
	* * *
01/01/77-01/31/77	P/O Walker's mental capacity continues to hamper him in his total job performance.
	* * *
	His inability to prepare written reports adequately and proficiently as required and expected of state police officer, due to incompetence, literarily [sic].

02/01/77-02/28/77	Capacity to decide correctly and logically needs improvement toward total, overall job performance.
	* * *
	Incompetence in preparation of written reports with proficiency and adequacy, due to inability.
05/01/77-06/31/77	In this area he is hampered and limited by his mental ability.
	* * *
	P/O Walker is limited or handicapped in this area by his mental ability.
05/25/77 [summary evaluation in support of extension of probation]	His thinking seems very slow at times due to his mental capacity.
	* * *
	. . . hampered by his mental ability.
	* * *
	Probationary/Officer Walker's mental capacity is his handicap in this particular area.
	* * *
	. . . is hampered by lack of mental ability when it comes to overall job performance.
07/07/77 [memo to Superintendent in support of discharge]	Constantly evaluators expressed concern about his mental ability and ability to comprehend, or express himself both verbally and written.

The ISP offered no evidence nor did the district court find that Hubbard Leroy Walker is mentally deficient.

Walker's probation had been scheduled to end June 13, 1977. However, on June 6, 1977, the ISP extended Walker's probation for three months relying on a May 25, 1977 memo alleging *mental deficiency*. (RA 62; PX 6a)

Although the Circuit Court stated that Walker's evaluations in 1977 "continued to state that plaintiff needed improvement in . . . judgment" (App. 3), the only category on the regular monthly evaluations in which Walker was rated as Improvement Needed in his performance after April 1977, was report writing, and the only criticism was that Walker made spelling and usage errors. (PX 18a, 18b App. 50) The only other area marked Improvement Needed between January and April 1977, was Judgment. The explanation the ISP provided for this rating was Walker's alleged *mental deficiency* and was not supported by fact. (PX 18a) Lt. Norman Burnworth, Walker's commander, testified that spelling and grammar are problems for a lot of troopers. (Stip 399) The ISP through its legal advisor, Tom Kough, admitted that spelling, usage, and diction errors are common among ISP officers. (Tr. Vol. II, p. 12) The Magistrate found that fact when he found " . . . that [Walker's] evaluators' spelling and sentence structure would embarrass an average eighth grade pupil." (Report App. 20)

In addition to offering no evidence of *mental deficiency*, the ISP did not charge Walker with misconduct or with any violation of laws, rules or policies or in any other way discipline him after October 1976. (RA 42, 44, 45, 47, 48, 254; Stip 46, 91, 125)

On June 14, 1977, after extending Walker's probation, the ISP solicited a complaint against Walker filed by a friend of Larry Rudolph, another trooper at the Evansville post. (Report App. 21-22; Stip 70; PX 10i) Attached to the complaint was a June 24, 1977 statement (hereafter called the Condis complaint) from William Condis, Rudolph's friend, containing throughout complaints based on an alleged interest of Walker in "white females." *Id.* The ISP's expert identified that complaint as containing the *oversexed-black-male* stereotype, and he further testified it contains racial prejudice. (Tr. Vol. V, p. 3 Liell p. 21) The Magistrate found that the ISP had solicited the complaint to build a case against Walker " . . . and thus justify his termination." (Report App. 22)

Sgt. Lunkenheimer in the May 31, 1977 evaluation of Walker's performance relies on the *oversexed-black-male* stereotype to state "His demeanor toward the opposite sex is an area to be observed also." (Stip 63; PX 4k) In that evaluation, Sgt. Ed Lunkenheimer lists no facts, describes no behavior, and makes no observation of the demeanor, conduct, or conversation of Walker which caused him to draw the negative conclusion. (RA 65)

The Magistrate specifically found that Walker had no unusual interest in women. (Report App. 17)

On July 7, 1977 James Mitchell, a police specialist assigned to assist John Shettle, Superintendent, forwarded to Shettle his summary of Walker's performance based on Walker's evaluations; Mitchell referred to Walker's being *mentally deficient* and referred to the *oversexed-black-male* stereotype in the Condis complaint by

saying "His attitude toward the opposite sex was also an area of concern." (PX 9c; RA 14, Stip 15, 76)

The Magistrate found that the ISP used the Condis complaint to fire Walker, and the ISP records explicitly so state. (Report App. 22; DX 115)

On July 28, 1977, Superintendent Shettle notified Walker that his employment was terminated as of Friday, July 29, 1977. (PX 3gg) The ISP fired Walker without a hearing, without interviewing him, without charging him, and without completing their investigation, all of which were required by ISP procedures. (Stip 91, 125, 142, 143, 150, 152, 270; RA 141, 149, 151, 154, 254, 351)

Walker filed a charge of race discrimination with the Equal Employment Opportunity Commission (EEOC) and the Indiana Civil Rights Commission. The Indiana Civil Rights Commission, another state agency, found probable cause to believe Walker had been discriminated against by the ISP because of his race. (RA 413)

In October 1986, the EEOC issued Walker a Notice of Right-to-Sue, and he subsequently brought this action against the State of Indiana, the Indiana State Police Department and the Indiana State Police Board claiming that Defendants discriminated against him on account of his race in violation of Title VII of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. Section 2000e, et seq.).

The case was tried before Magistrate Judge J. Patrick Endsley, who filed his Report recommending judgment against Walker on April 14, 1993. On July 13, 1994, District Judge Larry J. McKinney's entry upheld the Magistrate Judge's determination that Walker had not proven a direct evidence case of discrimination, a disparate treatment case, or a disparate impact case and entered judgment for Defendants. Plaintiff timely appealed.

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision on June 20, 1995 in an unpublished, four-page *per curiam* order, divided into an introductory section, a section called Facts, and a section called Analysis. Walker timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The Seventh Circuit denied that petition for rehearing on July 18, 1995. Walker is timely filing this Petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING SUMMARY REVERSAL OR ALTERNATIVELY GRANTING THE PETITION

I. SUMMARY REVERSAL IS ESSENTIAL BECAUSE THE COURT OF APPEALS HAS EGREGRIOUSLY DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS IN SANCTIONING THE DEFIANCE OF THIS COURT'S RULING IN *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989), BY AFFIRMING THE DECISION OF A MAGISTRATE JUDGE WHO DECLARED THAT THE RACIAL STEREOTYPES OF MENTAL DEFICIENCY AND OVERSEXED-BLACK-MALE ARE NOT PRESENT IN A CASE IN WHICH THEIR EXISTENCE IS FACTUALLY UNDISPUTED THROUGH JUDICIAL ADMISSIONS, THE EMPLOYER'S DOCUMENTARY EVIDENCE, THE TESTIMONY OF THE EMPLOYER'S EXPERT, AND THE FINDINGS OF THE MAGISTRATE JUDGE HIMSELF.

The Supreme Court emphasized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) that Title VII of the Civil Rights Act was intended to condemn even those employment decisions based upon a mixture of legitimate and illegitimate considerations. *Id.* at 241. This Court also identified the use of stereotypes unsubstantiated by independent facts as an illegitimate consideration upon which to base a decision. *Id.* at 250, 251.

Once a plaintiff in a Title VII direct evidence or mixed-motive case shows that an impermissible factor played a motivating part in an employment decision, to avoid liability the defendant must *prove* by a preponderance of the evidence that it would have made the

same employment decision if it had not taken the impermissible factor(s) into account. *Price Waterhouse*, 490 U.S. at 250, 253, 258.

Walker's direct evidence is uncontroverted, documentary, straightforward, and not subject to interpretation, and it consists primarily of judicial admissions.

Walker's final evaluation in July 1977, was clearly satisfactory (PX 6b App. 47), yet the ISP fired him.

The ISP gave as one reason for firing Walker his alleged low intelligence (RA 26, 27, 28), a baseless and humiliating allegation resting on an insidious racial stereotype.

The other reason the ISP records give for Walker's discharge is misconduct based on the Condis complaint. The ISP's expert found that the Condis complaint contained the racist stereotype of *oversexed-black-male*. The Condis complaint specifically contains allegations regarding Walker's alleged interest in white women. The Magistrate found the ISP solicited the Condis complaint to build a case against Walker and that the ISP used that complaint to discharge Walker.

The lower court ignored the undisputed admissions of the ISP through ISP Personnel Director John Jeffries that Walker clearly could do and was doing the job of a state trooper as early as the fall of 1976. The ISP admitted through ISP Legal Advisor Thomas Kough that the test upon which Walker scored 86% tested all aspects of the police function. The lower court also completely ignored the voluminous admissions and stipulations constituting

evidence under the *Price Waterhouse* analysis. He did not weigh that evidence; he acted as if it did not exist.

The Magistrate made the legally flawed statement that Walker has some sort of obligation to rely exclusively on indirect evidence of discrimination when direct evidence exists, ignoring the mandate of *Price Waterhouse*. (App. 30)

The lower court refused to apply to the undisputed facts or misunderstood the law enunciated by the Supreme Court teaching in *Price Waterhouse*.

The Magistrate made findings that are the same as the argument of the employer in *Price Waterhouse*. The Supreme Court rejected that argument and, based on that rejection, must now reverse the failure to find liability.

The Magistrate found, and the panel ratified, that the evaluators' use of the stereotype of *mental deficiency* in those evaluations proved only "a limited vocabulary." (Report App. 31) What this means is unclear, but in any event the state made no such defense nor was any evidence produced that Sgt. Lunkenheimer meant anything other than what he said.

Nowhere in the record does any agent of the Indiana State Police deny knowledge of the plain meaning of the ISP's words alleging *mental deficiency* explicitly stated 20 times in ISP documents without any factual evidence whatever to substantiate the allegation.

The ISP admitted they relied on the allegation of *mental deficiency* to fire Walker. (RA 26, 27, 28)

The panel's discussion of the conclusory testimony of the ISP officers that Walker was treated fairly, that there

was no racial hostility, and that the evaluations were based on "his actual performance or conduct and not upon his race," is all directed to conscious intent. Such a discussion has no place in the analysis of a racial stereotyping case. *Price Waterhouse*, at 247. The question is not "Did the employer intend to discriminate?" but rather "Did the employer engage in impermissible racial stereotyping in making its employment decision and thus discriminate on the basis of race in violation of Title VII?"

Stereotyping can be unconscious, a fact confirmed by the ISP's expert. (Tr. Vol. V, p. 3 Liell Testimony pp. 14-15)

The finding that in order to find stereotyping under *Price Waterhouse* the court must first find the employer's decisionmakers to be consciously racially prejudiced or find that the employer consciously intended to discriminate flies in the face of the Supreme Court's ruling in *Price Waterhouse*.[1] Because stereotypes can be unconscious, and because stereotypes may infect employment decisions even if the employer does not intend to allow them to do so, in *Price Waterhouse* the Supreme Court made clear that proof of an employer's use of unsubstantiated negative racial stereotypes establishes discrimination.

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[1] As the Supreme Court pointed out in *Price Waterhouse*, the earlier Supreme Court precedent in *Watson v. Fort Worth Bank and Trust*, 101 L.Ed.2d 827, 108 S.Ct. 2777 (1988), and *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175, 242 (1971), also dealt with employer conduct which, although not necessarily intentional, could establish discrimination. *Price Waterhouse*, at 242.

The lower court rejected the Supreme Court's holding that racial stereotyping unsubstantiated by independent facts constitutes discrimination. Although he failed to note that the ISP's expert identified as stereotypes the words in the evaluations, the Magistrate acknowledged that Walker's expert identified the stereotypical language in the evaluations. The Magistrate then found that Dr. Brookins " . . . could not, from the use of such words, determine the *motivating force* of the statement to be *discriminatory*." [Emphasis supplied] (Report App. 31) Determining whether or not the motivating force in the use of a stereotype is discriminatory is not the place of any expert. When negative racial stereotypes are used in making a negative employment decision unsubstantiated by independent fact a court must find discrimination. It takes no special training to discern race stereotyping in a description of a black officer who scores 86% on his final test and whose final performance evaluation is satisfactory immediately prior to his discharge as *lacking mental capacity*. *Price Waterhouse v. Hopkins*, 490 U.S. at 256. The expert testimony in this case is, as it was in *Price Waterhouse*, "icing on [Walker's] cake." *Id.*

Walker proved through the ISP's expert that stereotypes are present in the evaluations; he proved through judicial admissions that the *mental deficiency* stereotype was used to terminate Walker from his employment. (RA 26, 27, 28) Walker made his case under *Price Waterhouse v. Hopkins*. The Indiana State Police did not meet its burden of proof on rebuttal: the stereotype of *mental deficiency* which the ISP used in the evaluations is the very reason Superintendent Shettle gave for the discharge.

Although it is not Walker's burden to show the absence of *mental deficiency*, the record contains copious amounts of undisputed evidence that Walker is not mentally deficient:

a. Walker scored 86% on the objective test Defendants require all probationary troopers to take and which they must pass with a score of 70% or higher to pass probation (RA 375);

b. Walker had passed the seven-hour initial screening test for admission to the academy, had passed oral interviews, and had graduated from the academy, even taking and passing an oral examination in criminal law (See Stip 110, 111; Tr. Vol. V, p. 99 Furnas pp. 6-8, 15-17; Tr. Vol. III, p. 143);

c. Walker had a perfect record as a state trooper with respect to convictions of those citizens whom he arrested (PX 18a);

d. Walker's courtroom testimony in connection with his duties as a state trooper was effective (Tr. Vol. III, pp. 89, 160-162; PX 18a);

e. Walker received at least seven letters of commendation from the public, a good number for a probationary officer (PX 8; Tr. Vol. III, p. 61);

f. Walker's final evaluation was satisfactory (PX 6a).

The Magistrate's characterization of the direct evidence case is found in this telling statement: "Plaintiff's reliance on his trooper-trainer's *sins* to build a case of racial discrimination demonstrates the weakness of his cause." [Emphasis supplied] (Report App. 30)

The Magistrate failed to understand the significance of Walker's evidence concerning Sgt. Lunkenheimer's extremely poor English usage, which the Magistrate had described in his Report as being poor enough to "embarrass an average eighth grade pupil." The ISP clearly did not believe the white sergeant's usage errors evidenced mental deficiency.

There is no support other than the impermissible stereotype for any belief by the decisionmakers that Walker is *mentally deficient*. On the contrary, Walker's substantive performance is that of an intelligent, observant, hardworking, competent officer.

To the extent that the "sins" referred to are the repeated use by evaluators of racial stereotypes, it is indeed true that Walker relies on the clear, repeated use of those racial stereotypes to prove racial stereotyping. Plaintiff's case is not weak but, to the contrary, is strong and clear under *Price Waterhouse*.

Presentation of undisputed evidence does not constitute a self-serving view of the evidence. The only conclusion that proper application of *Price Waterhouse* to the facts of *Walker v. State of Indiana, et al.* can produce is this: the ISP's discharge of Hubbard Leroy Walker violated Title VII of the Civil Rights Act because it was discriminatory, based on his race.

Magistrate Endsley was not free to disregard judicial admissions and undisputed documentary evidence mandating judgment for Walker, and his doing that constitutes reversible error. A court may not fail to find a preponderance of the evidence by ignoring it. A court is not free to weigh unsupported declarations of negative

racial stereotypes against judicial admissions, stipulated, admitted, or testified to by the agents of a party to find an excuse for the discharge.

The humiliating racial stereotypes of *mental deficiency* and the *oversexed-black-male* are devastating racist stereotypes which have taken from Walker his own professional life and have taken from the citizens of the State of Indiana a fine state trooper.

An analysis of this case under *Price Waterhouse* mandates reversal and entry of judgment for Hubbard Leroy Walker.

II. SUMMARY REVERSAL IS MANDATED BECAUSE THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS IN UPHOLDING A LOWER COURT DECISION AGAINST AN EMPLOYEE IN AN EMPLOYMENT DISCRIMINATION CASE IN AN ORDER PURPORTING TO ANALYZE THE CASE WHILE NOT CITING TO OR ANALYZING ANY EMPLOYMENT DISCRIMINATION LAW UPON WHICH THE APPEAL WAS BASED, AND HAS DONE SO BY EFFECTIVELY DENYING WALKER THE APPELLATE REVIEW WHICH CONCLUSIVELY ESTABLISHES LIABILITY, REPLACING SUBSTANTIVE REVIEW WITH DIVERSION AND MISSTATEMENT.

The Supreme Court should grant this petition because the Circuit Court of Appeals for the Seventh Circuit has departed from the accepted and usual course of judicial proceedings in this employment discrimination case and has effectively denied Walker an appeal:

1. by misstating the issues raised on appeal;

2. by failing to acknowledge the ruling in *Price Waterhouse* and by failing to examine the Magistrate's refusal to recognize racial stereotypes: by its silence allowing unproved, uncharged, discriminatory allegations of *mental deficiency* and unfounded racist allegations of *oversexed-black-male* behavior to justify firing a black state trooper whose performance the employer admitted was satisfactory;

3. by finding that the Magistrate Judge made credibility findings he did not make and giving them special deference; and

4. by labeling the application of the law under *Price Waterhouse* to the undisputed facts "plaintiff's self-serving view" of the evidence.

The panel claimed in the first paragraph of its Analysis that:

> Walker complained that the negative evaluations were based on racial stereotypes about the *relative competence* of *white versus black officers* and were evidence of discrimination.

[Emphasis supplied] (Order pp. 3-4, App. 4) Walker made no such claim. Walker produced at trial direct evidence of unlawful discrimination through racial stereotyping proscribed by the Supreme Court in *Price Waterhouse*. The undisputed stereotypes used by the ISP to discharge Walker are *mental deficiency* and *oversexed-black-male*, especially with respect to white women.

The Circuit Court ratified the lower court's defiance of the Supreme Court without even citing to *Price Waterhouse*.[2]

The Circuit Court upheld the lower court finding stating:

> . . . the magistrate judge found the defense witnesses more credible than plaintiff, and concluded that the evaluation reports were based upon plaintiff's actual performance and did not reflect racial prejudice or stereotypes.

(Order p. 4 App. 4)

The panel found that the Magistrate Judge based his ruling on credibility determinations the Magistrate Judge did not make. The Magistrate made no credibility findings that affect the disposition of the direct evidence case. Nor could he have.

The only credibility finding the Magistrate made against Walker in his discussion of Walker's direct evidence case has no bearing on whether or not the Indiana State Police engaged in impermissible stereotyping in

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[2] The Circuit Court further ruled against Plaintiff Walker on his circumstantial case without even citing to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) or *Texas Department of Community Affairs v. Burdine*, 45 U.S. 248, 25 FEP Cases 113 (1981), and on his disparate impact case without citing to *Watson v. Fort Worth Bank and Trust*, 101 L.Ed.2d 827, 108 S.Ct. 2777, 47 FEP Cases 102 (1988). In fact, the only cases cited to were criminal cases regarding deference to credibility findings of the district court.

firing Walker.[3] There is not, nor can there be any credibility determination with respect to whether or not the ISP used the stereotypical language. The *mental deficiency* stereotype language is in the written evaluations the ISP admit they used to fire Walker. The *oversexed-black-male* stereotype was identified by the ISP's expert. He specifically testified the Condis complaint contains racial stereotyping and the lower court found the Condis complaint was solicited and was used to fire Walker.

With respect to the direct evidence case, there is no testimony of ISP witnesses which the Magistrate credited over Walker's testimony. The only credibility finding the Magistrate made relevant to Walker's direct evidence case he made against a number of ISP witnesses. The Magistrate found the Condis complaint to have been solicited to manufacture a case against Walker. (Report App. 22) The Magistrate did not believe the ISP command staff's denial that they did not consider the solicited racist Condis complaint when they determined to discharge Walker. The ISP records also show they discharged Walker based on the Condis complaint. The Magistrate failed to understand the significance of that credibility

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[3] The only credibility finding the Magistrate made against Walker was, with respect to Walker's testimony that he did not read the evaluation reports, " . . . the court does not find his testimony credible" on this point. (Report App. 30) If the panel's "special deference" is to what might be a blanket "credibility" finding by the Magistrate (Report App. 28), that deference is ill placed because a trial judge may not " . . . insulate his findings from review by denominating them credibility determinations. . . . " *Anderson v. City of Bessemer City*, 470 U.S. 564, 37 FEP Cases 396, 401 (1985).

determination, and the Circuit Court disregarded its existence.[4]

The Seventh Circuit compounded the lower court's error in disregarding the numerous judicial admissions and the testimony of the ISP's expert by disregarding that undisputed dispositive evidence itself.

If the Circuit had applied the teaching of the Supreme Court to the undisputed facts, it could not have upheld the lower court's ruling under the clearly erroneous standard, so, instead, the panel credited the Magistrate's ruling to credibility determinations he did not make and regarded them with "special deference." A court cannot make credibility findings with respect to judicial admissions: a judicial admission takes a fact out of contention.

The Circuit accused Walker of taking a "self serving view of . . . the evidence." (App. 4) Plaintiff's view of the evidence was not self-serving; it was a plain reading of the stereotype of *mental deficiency* which the ISP used in the written evaluations which it admitted relying on to discharge Walker. Plaintiff's view of the evidence is the only view possible under Title VII of the Civil Rights Act as interpreted by this Court in *Price Waterhouse*. (See Section I above)

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[4] The Seventh Circuit panel did note in its Facts section that "In July 1977, another officer reported receiving complaints about plaintiff's allegedly harassing behavior from a hotel manager." (App. 3) The panel failed to state that the lower court found the complaint was solicited and that both sides' experts found it to be racist on its face.

The panel's affirmation of the district court's judgment, if allowed to stand, is a signal that a district court in the Seventh Circuit may disregard the rulings of the Supreme Court.

To allow the Circuit to circumvent Supreme Court precedent in the way the Seventh Circuit has done in this case is to allow to go unchecked an egregious departure from the responsibility of a federal court of appeals to apply federal law.

When a Circuit Court of Appeals disregards a district court's clear error in assessing the evidence, as the court has done in the present case, this Court may grant summary reversal.

The Seventh Circuit endorsed by its silence the use of racial stereotyping in the lower court's clear defiance of the Supreme Court. This Court in *Price Waterhouse* said:

> . . . we are beyond the day when an employer could evaluate employees by assuming . . . that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their [race], Congress intended to strike at the entire spectrum of disparate treatment . . . resulting from stereotypes.' "

Price Waterhouse v. Hopkins, 490 U.S. at 251.

In the instant case, the panel disregards both the facts and the law to reach its unpublished *per curium* decision. See Chicago Council of Lawyers, *Evaluation of the United*

States Court of Appeals for the Seventh Circuit, 54 DePaul L. Rev. 673, 733-34, 757-58, 761 (1994).[5]

Justice Ginsburg wrote regarding unsigned *per curiam* opinions:

> When anonymity of pronouncement is combined with security in office, it is all too easy for the . . . insulated officials to lapse into arrogant ipse dixits.

Ginsburg, *Remarks on Writing Separately*, 65 Washington L. Rev. 133, 139 (1990), *citing* Kelman, *The Forked Path of Dissent*, 1985 Sup. Ct. Rev. 227, 242 (1986).

As Justice Stevens has written, parties are entitled to a fair and impartial trial; the Courts must confirm the objectivity and majesty of the judicial process. *United States of America ex rel. Terry L. Wilson et al. v. Joseph Coughlin*, 472 F. 2d 100, 103-4 (7th Cir. 1973).

If the Circuit Court opinion is allowed to stand, that will send a clear message that undisputed proof of discrimination under Title VII need not result in a finding of discrimination in the Seventh Circuit.

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[5] The Chicago Council of Lawyers raised serious questions regarding the judicial temperament of two of the members of Walker's panel for these same types of failings.

CONCLUSION

Petitioner is entitled to a summary reversal of the lower court's ruling, or this petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 17, 1995

Decided June 20, 1995

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

HUBBARD L. WALKER, *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 94-2962 *vs.*	)	
STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD, *et al.,*	)	No. 87 C 12
Defendants-Appellees.	)	**Larry J. McKinney,** *Judge.*

ORDER

Plaintiff Hubbard L. Walker filed a charge of race discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Indiana Civil Rights Commission. In October 1986, the EEOC issued Walker a notice of right to sue, and he subsequently brought this action against the State of Indiana, the Indiana State Police Department and the Indiana State Police Board claiming that defendants discriminated against him on

account of his race in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). The case was tried before Magistrate Judge Endsley, who filed his report recommending judgment against plaintiff in April 1993. In July 1994 District Judge McKinney's entry upheld the magistrate judge's determination that the plaintiff had proven neither a direct evidence case of discrimination nor a disparate impact case. Consequently the district court entered judgment for defendants, resulting in this appeal. We affirm.

Facts

In 1976 the Indiana State Police Academy, following a selection process that had been mandated by a consent decree entered in *Bailey v. DeBard*,[1] reserved 40% of the seats in each State Police Academy class for black applicants. Because of the consent decree, the State Police used two separate lists for considering applicants, one for blacks and one for all other persons applying for hire. For the 31st Academy class attended by Walker, 20 black persons were selected out of 141 black applicants while 30 persons were selected from 1,103 non-black applicants.

Plaintiff graduated last in his class from the 31st Academy in June 1976, although he had some trouble completing certain courses. Thereafter plaintiff went through a period of "on the job" training at the Evansville, Indiana, Post of the State Police for several months. He was the first black officer assigned to that Post.

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[1] U.S. District Court, No. 1P74-458C [sic] (Exhibit 12a).

Officers evaluating Walker during his training period consistently marked him down with respect to conduct and report writing. An officer evaluating plaintiff in 1976 marked him as needing improvement in conduct, judgment, discipline, initiative, knowledge of patrol area or assignment, knowledge of laws, rules and regulations, policies and procedures, public relations, ability to make reports, work attitude, operation and care of Department equipment and preparation and presentation of court cases. The evaluating officer reported that Walker used his police badge to gain entry into night clubs while off duty. The evaluation particularly noted that plaintiff's reports were inaccurate, incomplete and sometimes not understandable.

Evaluations conducted in 1977 continued to state that plaintiff needed improvement in certain areas including judgment and errors in reports, and that plaintiff needed counseling about his job performance.

In addition to critical evaluations, plaintiff also received a one-day suspension in October 1976 following a verbal altercation with a waitress in a local restaurant. In July 1977, another officer reported receiving complaints about plaintiff's allegedly harassing behavior from a hotel manager.

At the end of Walker's probationary year, the police superintendent ordered Walker's probationary period extended for an additional 90 days. Subsequently, after Walker refused to attend a meeting that had been arranged to discuss his ongoing problems, he was terminated from the force.

Analysis

Walker complained that the negative evaluations were based on racial stereotypes about the relative competence of white versus black officers and were evidence of discrimination. The magistrate judge heard testimony from a number of police officers who testified that plaintiff had been treated fairly, that the atmosphere at the Post was not racially hostile, and that the evaluations and reports about plaintiff were based strictly upon his actual performance or conduct and not upon his race. A witness with experience in racial relations also disputed Walker's contention that the language used in his evaluations reflected racial stereotyping or racial prejudice.

After hearing this testimony, along with Walker's, the magistrate judge found the defense witnesses more credible than plaintiff, and concluded that the evaluation reports were based upon plaintiff's actual performance and did not reflect racial prejudice or stereotypes. These credibility determinations and factual determinations are entitled to special deference. *United States v. Harrison,* 42 F.3d 427, 431 (7th Cir. 1995); *United States v. Linnear,* 40 F.3d 215, 220 (7th Cir. 1994). There is no reason to substitute plaintiff's self-serving view of the evaluations and other evidence for those accepted as credible by the magistrate judge.

The magistrate judge also rejected plaintiff's disparate treatment claims on the basis that Walker had offered insufficient evidence in support of it. Again, the magistrate had the opportunity to hear testimony relating to defendants' intent and resolved credibility questions in their favor and against Walker. His conclusions are not

clearly erroneous nor subject to reversal. Finally, the magistrate judge concluded that Walker's statistical evidence of disparate impact was properly rejected because it ignored the practical realities of the consent decree.

Affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 20, 1995

BEFORE: **Honorable** WALTER J. CUMMINGS,
Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable FRANK H. EASTERBROOK,
Circuit Judge

No. 94-2962

HUBBARD L. WALKER,

Plaintiff-Appellant

v.

STATE OF INDIANA, INDIANA
STATE POLICE DEPARTMENT, INDIANA
STATE POLICE BOARD, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Indiana,
Evansville Division.
No. 87 C 12, Larry J. McKinney, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

HUBBARD LEROY WALKER, Plaintiff,	)	
vs.	)	CAUSE NO. EV 87-12-C
STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD, Defendants.	)	

NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT OF EVIDENTIARY HEARING, RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED JUDGMENT

You are hereby notified that the undersigned United States Magistrate Judge has this date filed the attached Magistrate Judge's Report of Review and Recommendation, Proposed Entry and Judgment Thereon with the Honorable Larry J. McKinney, United States District Judge, pursuant to the order of reference in said cause.

Counsel shall have ten (10) days from the date of filing of the report to file objections thereto and objections to the entry of judgment in accordance therewith. Failure to file objections will result in a waiver of the right to appeal the judgment generally or a waiver of appeal as to specific alleged errors to which objection is not made. *Provident Bank v. Manor Steel Corporation*, 882 F.2d 258 (7th Cir. 1989).

Dated this 14th day of April, 1993.

/s/ J. Patrick Endsley
J. PATRICK ENDSLEY,
Magistrate Judge
United States
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Southern District of
Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

HUBBARD LEROY WALKER, Plaintiff,	)	
vs.	)	CAUSE NO. EV 87-12-C
STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD, Defendants.	)	

REPORT OF EVIDENTIARY HEARING RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND PROPOSED JUDGMENT

This matter came before the undersigned United States Magistrate Judge on reference from the Honorable Larry J. McKinney, United States District Judge pursuant to the provisions of Title 42 U.S.C. § 2000e-5(f) (5) and Rule 53, Federal Rules of Civil Procedure, to conduct an evidentiary hearing and to file his recommended findings of fact, conclusions of law and proposed judgment entry.

The plaintiff appeared in person and by his counsel, Virginia O'Leary and Darlene Robinson. The defendants appeared by counsel, David Steiner, Deputy Attorney General, State of Indiana, and the cause was submitted for hearing on the 19th day of October, 1992, in Indianapolis, Indiana. Additional evidence was heard in Evansville, Indiana, on October 22 and 23, 1992, and was concluded in Indianapolis, on November 2, 1992.

The parties have submitted their proposed findings of fact and conclusions of law and trial briefs. The Magistrate Judge being duly advised on the premises now submits his report and recommendation. On April 28, 1992, the magistrate judge entered his proposed amended findings on the plaintiff's motion for partial summary judgment on the issue of the plaintiff's establishment of a *prima facie* case. After reconsideration as requested by the defendants, the magistrate judge vacated the findings and entered new findings on June 25, 1992, as follows:

1. The plaintiff, Hubbard LeRoy Walker, is a black person.
2. The plaintiff was employed by the Indiana State Police.
3. The plaintiff testified that he was performing his work in a satisfactory manner.
4. The plaintiff was discharged from the Indiana State Police in July, 1977.
5. The Indiana State Police continued to hire officers after plaintiff's termination.

Court's Entry of June 25, 1992, p.2.

The Magistrate Judge also entered the following conclusions of law:

1. This Court has jurisdiction of the parties and subject matter pursuant to Title 42 U.S.C. § 2000(e) *et seq.* and 28 U.S.C. § 1343.
2. This action is for a violation of Section 706 of the Civil Rights Act of 1964 as amended in 1972.
3. Plaintiff has proved by a preponderance of the evidence that (1) he belongs to a racial

minority, (2) he was performing his job sufficiently as to meet his employer's legitimate expectations, (3) in spite of his performance he was discharged, and (4) the Indiana State Police sought a replacement for him.

4. The law is with the plaintiff and against the defendants. The plaintiff is entitled to a finding in his favor as he has established a *prima facie* case of racial discrimination.

5. If necessary to sustain the judgment herein, any conclusions of law shall be construed as a finding of fact and any finding of fact as a conclusion of law.

Court's Entry of June 25, 1992, p.3.

Except as hereinafter stated, this report adopts the findings of fact and conclusions of law entered on June 25, 1992.

Mr. Walker is a citizen of the State of Indiana and the United States of America. The defendants are the State of Indiana, the Indiana State Police Department, and the Indiana State Police Board, a unit of state government which is organized and functions in accordance with the statutes and regulations of the State of Indiana.

The Background

In 1974, the Superintendent and the Department had been sued for, among other things, racial discrimination in the recruiting and appointment of blacks (Afro-Americans) to the department. *See Bailey v. DeBard*, IP 74-458-C (S.D. In.) On April 26, 1976, a Consent Decree was entered in this cause.

In anticipation of the approval of the decree's provisions concerning recruitment and training of minority officers, the defendants implemented the requirements, including the use of two (2) lists, and reserved forty percent (40%) of the recruit classes for minorities until the department's police employees were at least seven percent (7%) black persons.

The Plaintiff

Hubbard Leroy Walker was a twenty-two (22) year-old graduate of Richmond (Indiana) High School, class of 1972, where he ranked 626 out of a class of 716, with a grade point average of 1.6 on a four (4) point scale. Plaintiff's Exhibit 3k. He was born on December 30, 1953. At the time of his November, 1975, application to the Indiana State Police, he had attended the Lincoln Extension Institute, Inc. for approximately eighteen (18) months, completing some sixteen (16) different courses in the field of industrial management. He apparently received some form of diploma in September, 1975. Plaintiff's Exhibit 3h.

Mr. Walker was selected to attend the 31st State Police Academy under the procedures required under the *Bailey v. DeBard* Consent Decree. Forty-nine (49) persons were selected of which nineteen (19) were blacks. At this time, there were only three (3) active black state policemen.

Plaintiff finished the course and graduated forty-fifth or last of those completing the academy.[1] His grade record on college level courses reveal two (2) D's and one (1) F. The academic record as well as weekly comments highlight his lack of achievement. Weekly Academy Evaluations were as follows:

Week Ending 3-5-76	Slow in physical training.
Week Ending 3-8-76	Too talkative.
Week Ending 3-19-76	Poor grade average, needs to study. Good appearance.
Week Ending 3-26-76	Very poor grades Spelling grades 18, 40, 48. First exam grade 60.
Week Ending 4-9-76	He is unsatisfactory academically. Showed a real improvement on fourth spelling test, after having a study counselling session with him. He still failed test, but doubled his score from previous test. Academically at this stage he is questionable. If he is to make it through satisfactorily, a strong improvement is *very* necessary. Does OK in P.T. He's quiet and has a good personality.

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[1] Although listed as 48th, there are only 45 persons shown as graduating. Defendant's Exhibit 110.

Week Ending 4-16-76	Academically is unsatisfactory in all graded areas. Scored very poor (54) in mid term law exam. He has been counselled about his academic stature and is aware of the necessity to make a strong improvement. He has a very good attitude and seems sincere in his desire to do well. (I believe he needs more counseling-tutoring which he will receive.) Good appearance and good P.T.
Week Ending 4-23-76	He is having academic problems but appears to be honestly concerned about improving. He has asked for and received assistance to help improve. He has good attitude and appearance. Works hard at P.T.
Week Ending 5-7-76	Scored 3 points above his average on his 4th test; however, still failing. OK in all other areas.

Defendant's Exhibit 111.

After having a poor grade on the criminal law test (54/100) during the week ending April 16th, plaintiff testified that he scored a very high grade on the second criminal law test and that he was subsequently called into a room by Lt. Furnas and Lt. Sheets, accused of cheating,

and given an oral examination. Plaintiff described his time in the Academy as "rough." No doubt it was, however, the weaknesses noted by his trooper-trainers at the Evansville Post appear to be predictable after a review of his Academy record.

Plaintiff believed the criminal law episode had racial overtones. He recited two (2) other incidents at the Academy in which the term "boy" was used either toward himself or another black cadet as further instances of racial bias or animosity. He apparently did not report any alleged mistreatment even though there was a least one (1) black counselor available at the Academy.

Following graduation, Mr. Walker was assigned to the State Police Post in Evansville, Indiana, as a probationary trooper and for a period of "on the job" training, where he served for approximately fourteen (14) months. At the time Mr. Walker was assigned to the Post in Evansville, black probationary officers were assigned to other posts in the state.

At the time of his appointment, plaintiff was married to a white woman and person or persons unidentified allegedly told him that he was going to have a rough time. He believed other troopers at Evansville avoided him because of his race and his interracial marriage. Sgt. Lunkenheimer noted in the evaluation for the month of May, 1977, Plaintiff Exhibit 4(k), that he "sometimes thinks some members of the Department have not accepted him because of his race." However, plaintiff did not testify to any specific incident involving specific members of the Indiana State Police upon which he based his conclusion.

The Evansville Post

The plaintiff was the first black officer assigned to the Evansville Post. He was the sole black officer until William W. "Woody" George[2] was assigned on or about October 17, 1976. Mr. George has now served more than sixteen (16) years as a permanent Indiana State Police trooper. At unspecified times, plaintiff felt that there was a feeling of racial tension at the Post. However, no person in the chain of command observed any discriminatory acts nor heard any racial comments concerning Mr. Walker during his time at the Post.

After Walker was assigned to the Evansville Post, his district commander (Norman Burnworth) assisted Mr. Walker in finding a house and residence in the Evansville area, and several fellow police officers encouraged Mr. Walker and developed a satisfactory working relationship with him. However, plaintiff still felt that a number of fellow officers were hostile toward him because his wife was white.

The plaintiff underwent the same training program as other probationary officers. During this period, probationary officers of the State Police Department were subject to evaluations by those persons who were involved in training them and also by their immediate supervisors on a monthly basis. The "Probationary Trooper Evaluation Report" required that each probationary officer be rated in the following areas of performance: I. Appearance; II.

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[2] Shown as 36th in a class of 43. Defendants' Exhibit 112. Also in the 32nd class, Lacy M. Johnson, shown as 19th in the class. Mr. Johnson later completed law school and practices law.

Conduct; III. Judgment; IV. Fellowship and Association; V. Discipline; VI. Initiative, Self-Reliance and Resourcefulness; VII. Alertness and Observation; VIII. Effort; IX. Knowledge of Patrol Area or Assignment; X. Knowledge of Laws, Rules and Regulations, Policies and Procedures; XI. Public Relations; XII. Ability to Make Reports; XIII. Work Attitude; XIV. Operation and Care of Department Equipment; XV. Preparation and Presentation of Court Cases; and XVI. Any Other Factors affecting the probationer's efficiency.

Mr. Walker received satisfactory ratings on most of the categories; however, he was consistently found wanting in the areas of conduct and report writing. In one of his earliest evaluations, the late John Hatfull noted a need for improvement in thirteen (13) of the sixteen (16) categories. The most serious example of plaintiff's questionable conduct was the use of "his police badge to gain entry into nightclubs while off duty." Plaintiff's unusual interest in the female sex was also noted on several reports. In light of plaintiff's age (22 or 23 at the time), such an interest does not appear to be unusual for a male police officer or other persons of similar age, married or unmarried.

In September, 1976, on schedule, plaintiff received his commission (a State Police automobile) and came under the supervision of Sgt. Lunkenheimer, who filed evaluations beginning in September, 1976, and ending in June, 1977. The reports indicate generally satisfactory performance but continued problems in a number of areas. Among other areas, Sgt. Lunkenheimer marked Walker down in judgment in the September, October, December, January, February, March and May evaluation reports.

Sergeant Lunkenheimer also found Walker to be deficient in writing reports in every evaluation. The Sergeant questioned whether Walker had the mental ability to perform some of the requirements of the job, particularly in the areas of judgment and writing reports due to continual problems in these areas. For example, in the May report, Sgt. Lunkenheimer was concerned about Walker's judgment because of an incident where he did not communicate well on the radio due to an apparently over-excited state of mind. Plaintiff's Exhibits 4 and 5.

In a memorandum to Superintendent Shettle dated May 20, 1977, concerning the status of probationary troopers, Commander Burnworth stated in part: "We are still concerned about his ability to complete accurate reports. At times his attitude and demeanor are less than satisfactory." Plaintiff's Exhibits 1h and 9a.

By the time of the May 25, 1977, summary evaluation, Walker was still being marked as needing improvement in several areas, including conduct, judgment, initiative, report writing and work attitude. In the area of conduct, Walker was beginning to show resentment with respect to corrective criticism. Plaintiff's Exhibit 6a.

A number of other incidents cast doubt upon plaintiff's suitability to serve as an Indiana State Policeman. There were reports of his lack of judgment in drawing his weapon during a traffic stop, looking for law violators while off duty, a narcotics investigation within the city of Evansville, and the "Fish Port" incident.

On November 4, 1976 plaintiff received a "Statement of Written Charges" arising out of an incident at the Fish Port Restaurant which read as follows:

> At 6:00 PM on October 26, 1976, Probationary Officer Leroy Walker PE 3104 was in the Fish Port Restaurant and became involved in an altercation with the waitress, Linda L. Griesinger. Probationary Officer Walker addressed Miss Griesinger in such manner that she became visibly upset and started to cry. Probationary Officer Walker conducted himself in such manner as to bring discredit to the uniform. Probationary Officer Walker made a threat directed towards Miss Griesinger that he would be watching for her and would throw the book at her.

Plaintiff's Exhibit 3i.

The plaintiff waived his right to a hearing before the Post Commander and received a one (1) day suspension without pay. Plaintiff's Exhibit 3aa. Mr. Walker asserts that the incident was blown out of proportion and that he was only joking with the young lady.

Thomas Kough, who was involved with the legal section of the State Police Department at the time and who was monitoring the progress of the black probationary officers, never heard that Walker had any problems with racial harassment, racial slurs or racial tension while he was a probationary officer. Mr. Walker never complained to him of any such problems.

After the Fish Port incident, Walker continued to have problems meeting the subjective standards required for a state police officer, as noted above. Sergeant

Lunkenheimer claims that he personally counseled Walker about the areas where he needed improvement during each evaluation. Among other suggestions, the Sergeant urged Walker to seek outside assistance to help him with his report writing. However, by May of 1977, Walker took offense at corrective criticism offered by his trooper-trainer. Plaintiff has denied that Sgt. Lunkenheimer went over the evaluations with him and that he signed them without reading them. The Court believes plaintiff's statement is not credible on this point.

Near the end of his probationary year, Lt. Burnworth sent a memorandum to Superintendent Shettle recommending that Walker's probationary period be extended for ninety (90) days because Walker's performance had been less than satisfactory. The probation extension request was made to give Walker additional time to meet the required standards for a State Police officer. The recommendation of the ninety day extension was by mutual agreement of command in Evansville.

The Burnworth memorandum was prepared by command staff and most particularly by Sgt. Lunkenheimer and contained additional criticism of plaintiff's performance, including the use of his automobile to transport the family dog; his attempt to portray himself as an "old salt"; his continuing difficulty in spelling and report writing; lack of "mental capacity"; and poor attitude and demeanor. Plaintiff's Exhibit 6a. The Court notes that the evaluators' spelling and sentence structure would embarrass an average eighth grade pupil.

Mr. Walker's probationary period was extended for three (3) months by the Indiana State Police Board on

June 6, 1977. Lt. Burnworth was notified of the extension of plaintiff's probation by memorandum from Lt. Col. Raney, dated June 9, 1977. In a memorandum from Superintendent Shettle to plaintiff, dated June 20, 1970, Mr. Walker was formerly [sic] notified that his probation had been extended for three (3) months.

The Holiday Inn Incidents

Meanwhile back in Vanderburgh County another investigation of plaintiff's conduct was underway. It appears that the Holiday Inn and the Evansville Post had a cozy relationship which included inexpensive room charges for newly assigned troopers, allowing them to find homes or other accommodations at their leisure. The Inn also appeared to be a "hangout" for the troopers when off-duty. Trooper Larry Rudolph was the liaison with the Inn. Both plaintiff and Trooper George stayed there for approximately a month and half when first assigned to the Evansville Post.

The manager, Mr. Condis, filed a complaint in June, 1977, asserting that plaintiff had, during the months of April and May, engaged in improper conduct on several occasions involving two (2) female employees and alleged drug activity at the Inn; that Walker was cruising the parking lot and stopping customers leaving the lounge for questioning. Mr. Condis' statement [Plaintiff's Exhibit 10(i)(1)] concludes: "But I can't believe all of these occurrences can take place in the course of a trooper's duties by accident. This is my reason for submitting this statement."

The complaint appears to have been solicited by another Indiana State Police trooper (Rudolph) and could have been the basis for disciplinary proceeding against Walker. Command staff deny that this little caper was even considered by anyone in the command in relation to plaintiff's discharge. This appears to be impossible, at least subjectively, as everyone in the line had some knowledge of the allegations prior to plaintiff's termination. The incidents cast doubt on plaintiff's judgment.

The manner of the various denials lends credence to plaintiff's allegations but does not establish that plaintiff's race was the reason for his termination. The record supports the inference that the report was part of a "case building" process that would have supported the proposition that, after almost a year, the plaintiff still had not exhibited those qualities required of a permanent trooper and thus justify his termination. However, plaintiff's July 1, 1977, narrative evaluation by Commander Burnworth is generally favorable and concludes that "job performance has been satisfactory this month.["] Plaintiff's Exhibit 6b.

Condis simply did not want troopers, regardless of their race, harassing his employees or his customers. The solicitation of the report raises the inference that the command staff was aware of the allegations and supported the efforts to pin down additional examples of plaintiff's questionable conduct, lack of judgment, character weaknesses and general unfitness to serve the Indiana State Police. However, there is nothing in the report that indicates racial bias as the basis for the statements by the individuals or of the troopers involved in the various incidents covered in the report.

The Termination

In June and July of 1977, the chain of command above Walker included Superintendent Shettle, Lt. Col. Raney, Major Forrest Cooper, Lt. Burnworth and Sgt. Lunkenheimer.

At the beginning of 1977, Major Forrest Cooper was assigned to supervise the Operations of the Indiana State Police Department in the southwest quadrant of the State. Prior to that time, he was the north zone commander. Major Cooper, a not so mild-mannered redhead, had seen reports and evaluations relating to Walker and was aware that the evaluations and reports indicated that some of Walker's work had not been satisfactory. He was aware of Mr. Walker's weaknesses and faulty judgment.

Of all the command staff involved in this action, only Major Cooper has been identified as having at one time uttered a derogatory racial statement to another officer, a black officer at that. The statement was not directed to or in any way related to plaintiff. There is no other evidence of any act or statement which would indicate predisposition on the part of Major Cooper.

Upon receipt of the Burnworth memorandum, Major Cooper recommended that plaintiff's probation be extended indefinitely because it was his personal view that all extensions of probation should be indefinite (up to a year) so that the Superintendent would have more discretion in evaluating probationary officers who were on the bubble.

Following notification of the probation extension, Major Cooper testified that he set up a meeting so that he,

Walker and command staff in Evansville could get together and discuss what Walker needed to do to get off probation and become a permanent employee. Major Cooper wanted Walker to know what his shortcomings were and how to make improvements to get him off of probation.

On July 6, 1977, Major Cooper wrote a memorandum to Superintendent Shettle recommending that Walker's employment be immediately terminated. The memorandum resulted from an aborted meeting between he, Walker and command staff in Evansville which had been set for July 5, 1977. In his Memorandum to the Superintendent, dated July 6, 1977, Major Cooper stated:

> Trooper Walker had his probationary period extended for ninety (90) days from June 13, 1977. On June 9, 1977, I informed Trooper Walker that his probation had been extended. At that time we discussed some of the reasons for the extending of his probation. He personally felt that there were other reasons. At that time Lieutenant Burnworth was in school, his squad commander Sergeant Lunkenheimer was on day off. I recommended to Trooper Walker that we set a meeting of a later date for constructive consultation as to what was expected of him and include the Lieutenant and the Sergeant.
>
> This meeting was set for Tuesday, July 5, 1977, at 10:00 a.m. When Trooper Walker appeared for this meeting he had another person with him. This person identified himself as Third Vice President of the NAACP, Mr. Starr.
>
> I informed Mr. Starr and Trooper Walker that Mr. Starr was not welcome in the meeting. I further informed them that if Trooper Walker

wanted to tell Mr. Starr what transpired in the meeting he could do so. They both insisted that Mr. Starr should be permitted in the meeting. I informed them that this was a meeting for the purpose of clarifying and informing Trooper Walker of his past problems and what was expected of him to become a permanent and productive member of the Indiana State Police and that this meeting was for constructive consultation only and nothing about an investigation that is being conducted on him was going to be mentioned.[3]

Mr. Starr advised Trooper Walker not to attend the meeting but to wait until he had a chance to talk to the Superintendent.

Trooper Walker was to attend this meeting for the purpose of constructive consultation to assist him in becoming a productive employee without problems. He refused to attend this meeting without NAACP legal counsel being present. This was on the twenty-third day of his ninety (90) day probationary extension.

In view of the fact that the purpose of a probationary period is to further train and to observe the employee as to his potential of becoming a productive member of the Department with no problems, the Command at Evansville felt they needed additional time to train and observe Trooper Walker after the initial probationary period of one year.

Due to the fact that Trooper Walker was more interested in having someone else to represent him in the meeting than to find out what he

---

[3] The "Holiday Inn Incident."

> needed to do to become a permanent productive employee when the time to educate and observe was down to only sixty-one (61) days after already being trained and observed for three hundred and sixty-five (365) days and rated as questionable, I recommend that Trooper Walker be terminated immediately.

Exhibit 10(i)(1), pp. 23, 24.

Major Cooper confirmed the details of his memorandum in his testimony and emphasized that he made it clear to Walker that the meeting was for constructive consultation only. Major Cooper wanted to make sure that Walker and Sgt. Lunkenheimer were communicating with each other. Plaintiff denies that he was so informed and asserts his belief that the meeting was a disciplinary hearing arising out of the "Holiday Inn" incident even though he had not been notified of any charges.

Mr. Herb Starks, 3rd Vice-President of the state NAACP in 1977, stated that Mr. Walker had told him that the meeting was of a disciplinary nature. He had no other source for this information. During the discussion preceding the meeting, he asserted that Major Cooper did not state that the meeting was for counseling purposes.

Indiana State Police regulations require that disciplinary charges be made in writing (as in the Fish Port incident) and no such charges had been made at the time of the meeting. The Court finds that the purpose of the hearing was not disciplinary in nature but was for counselling the plaintiff as outlined by Major Cooper.

Following Major Cooper's recommendation to terminate plaintiff, then Police Specialist IV James Mitchell

prepared a memorandum to Superintendent Shettle, dated July 7, 1977, comparing evaluation reports for William George, P.E. 3174 and Hubbard L. Walker, P.E. 3104. William George completed his probationary period without being extended. In the Mitchell memo of July 7, 1977, he concluded that probationary officer George was performing satisfactorily but pointed out Walker's evaluations had consistently reflected a need for improvement in the areas of conduct, judgment, initiative, ability to make reports and knowledge of laws, rules and regulations, and policies and procedures. Mitchell also observed that evaluators expressed concern about Walker's ability to express himself both verbally and in writing and that his attitude toward the opposite sex was a matter of concern. Plaintiff's Exhibit 9c.

Major Cooper's memorandum was the fuse that resulted in plaintiff's termination as a probationary officer. Then Superintendent Shettle testified that Walker was terminated based upon his judgment that Walker had not satisfactorily performed the duties of a probationary officer. The decision was based on the Superintendent's evaluation of Walker's total performance. Among other matters, the Superintendent was concerned about Walker's inability to complete accurate reports, his attitude and demeanor (including resentment of constructive criticism), the one-day suspension for misconduct, his problems with learning laws, rules and regulations, and incidents reflecting poor judgment. Walker's termination was not a disciplinary matter. Plaintiff's entire file was available to him.

The Superintendent further opined that the Department standards required persons who exhibited a stable

personalty [sic], were physically fit, alert and able, who possessed good communication skills, and who could understand and carry out written instructions. They looked for persons of good character and morals.

Superintendent Shettle made it clear that he knew it was his responsibility to enforce the Consent Decree. By April, 1977, the ISP was increased from three (3) black troopers (before the Consent Decree) to thirty-one (31). Plaintiff's Exhibit 1d-2. Recruiting strategies were developed to attract minority applicants, and the progress of black probationary officers, men and women, were monitored to make sure they were being fairly treated. The extension of the probationary period for three (3) or four (4) months was used in the same manner both before and after "DeBard." There was nothing in the reports that the Superintendent received to cause him to believe that Walker had been unfairly treated.

Plaintiff was terminated, effective July 29, 1977, and was notified by a memo from the Superintendent, dated July 28, 1977, in which the Superintendent stated that "(a)fter reviewing your evaluation reports from your commanding officer and having been advised of your performance during your probationary period, I have determined that you do not meet the standards required of an Indiana State Police Officer." The Indiana State Police Board subsequently approved Walker's termination. There is no credible evidence in this case that the fact that plaintiff Walker is a black person had any part to play in any evaluation of his performance or in the ultimate decision of the Superintendent and State Police Board to discharge the plaintiff.

Racially Tense Work Atmosphere

Several long-time black officers, none of whom served at the Evansville Post during the 1976-1977 period, believed that there was a racially tense atmosphere in the department. These officers were stationed in the Indianapolis area. Trooper George, a probationary trooper during this period, now a sixteen (16) year veteran, found no such atmosphere in the Evansville Post. George never heard any command staff personnel make a racial comment. Nor did he find it abnormal for others to "look at" mixed couples at the 1976 staff Christmas party, where both plaintiff and George were accompanied by white women. Nor did George have problems with his evaluators, who treated him fairly. Trooper George stated that the trooper-trainers purpose was to help the probationary officers. None of the trooper-trainers ever said anything of a racial nature. He did receive a few "needs improvements" on his monthly evaluations and agreed that he did need improvement in the areas in question.

Trooper George lived with plaintiff after leaving the Holiday Inn and did socialize with him on several occasions. A "couple of times" plaintiff, while off-duty and in civilian dress, identified himself as a policeman. During the period of plaintiff's probation, Mr. George was also on probation but appears to have suffered none of the problems that plaintiff alleges.

The evidence does not support a finding of a hostile or racially tense work atmosphere at the Evansville Post during 1976 or 1977.

Racial Stereotyping

Sgt. Edward Lunkenheimer would never win an award for erudition. His choice of words to describe one's shortcomings is obviously limited. Plaintiff's reliance on his trooper-trainer's sins to build a case of racial discrimination demonstrates the weakness of his cause.

Mr. Walker bases his case almost entirely upon the contents of the monthly evaluation reports. Plaintiff never objected to any evaluation in whole or in part during his tenure. Although he now claims he never read the reports and that they were not discussed with him, the Court does not find his testimony credible. He signed the evaluations which attest that they were read and discussed. His trainer has so testified.

Robert Brookins, B.A., M.S., J.D., Ph.D., Associate Professor of Law, Indiana University School of Law – Indianapolis, was tendered as an expert witness in the field of stereotyping. The Court refused to create such a field of expertise but, in light of his background in labor relations and discrimination, permitted Dr. Brookins to testify on behalf of the plaintiff. *See* Plaintiff's Exhibit 35, Curriculum Vita of Dr. Brookins.

The witness defined a stereotype as an exaggerated belief concerning a characteristic which exists is [sic] a group of people and extends beyond a factual basis. Such characteristics may or may not exist in fact.

Working from plaintiff's exhibit 17, a self-serving conclusionary document prepared either by counsel or by the witness, plaintiff attempted to attribute every criticism of his performance in the evaluations to what is

described as a racial stereotype. Although Dr. Brookins could categorize certain words used as stereotypical he could not, from the use of such words, determine the motivating force of the statement to be discriminatory. The use of racial stereotype language is based upon probabilities not necessarily on the true intent of the speaker or writer.

Dr. Brookins, who had never heard of a "Bubba" personalty [sic], concluded that stereotypical terms are a matter of definition and some stereotypes apply to more than one group of people. A review of the evaluation and the use of words and phrases used therein does not indicate a racial bias, just a limited vocabulary.

As Justice O'Connor noted in her concurring opinion in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775 (1989): "Stray remarks in the work place . . . cannot justify requiring the employer to prove that its . . . decisions were based on legitimate criteria. Nor can statements by non-decision makers or statements by decision makers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard." *Id.* 490 U.S. at 277, 109 S.Ct. at 1804.

There is an unfortunate tendency of some plaintiffs in employment cases to prove Alexander Pope's aphorism that "all looks yellow to the jaundic'd eye" (Essay of Criticism, Part II, line 359). *See Brown v. Avon Products, Inc.,* 57 Fair Empl. Prac. Cas. (BNA) 1825 (N.D. Ill., Oct. 4, 1989).

> Unless the remarks upon which plaintiff relies were related to the employment decision in

> question, they cannot be evidence of a discriminatory discharge.

McCarthy v. Kemper Life Ins. Co., 924 F.2d 683, 686 (7th Cir. 1991).

The areas where plaintiff is marked as needing improvement are the same areas of weakness shown in high school and Academy transcripts.

Miscellaneous

The evaluation of the evidence in this case has been made more difficult by the passage of more than fifteen (15) years. Memories fade, witnesses have aged, some have died. Records have been legitimately destroyed. The tortuous path this suit took before filing in Federal Court appears to be related to Mr. Walker's success in the private sector and his subsequent industrial injury and resultant unemployment. This in no way reflects on Mr. Walker's belief that he was a victim of racial discrimination. However, it may well explain the absence of comparative evaluation data and thus leaves the Court hanging in mid-air. The only comparative material was Trooper George, who went through his probationary training during the same period (beginning three months after plaintiff). He completed his training under the same command staff, without incident, and has served the department for more than sixteen (16) years.

Conclusions of Law

1. This Court has jurisdiction of the parties and subject matter pursuant to Title 42 U.S.C. § 2000e *et seq.* and 28 U.S.C. § 1343.

2. The plaintiff had established a *prima facie* case of racial discrimination in his termination as a probationary Indiana State Trooper based upon the Court's prior findings.

3. Based upon all of the evidence in the record, the plaintiff was not performing his job in a manner sufficient to meet the legitimate reasonable expectations of his employers.

4. The defendants have established by a preponderance of the evidence a valid non-discriminatory basis for plaintiff's termination as a probationary employee.

5. The plaintiff has failed to prove his "direct evidence theory" of racial discrimination. The acts of the command staff in evaluating plaintiff's performance were not based upon racial stereotyping or other impermissible factors.

6. Plaintiff has failed to establish by a preponderance of the evidence that the reasons stated for his dismissal were pretextual. The Court finds that the dismissal decision of the Superintendent was a proper exercise of his discretion and judgment based on the information and evaluations available to him at the time the decision was made.

7. The Court finds no merit to plaintiff's "statistical" case. The retainage rates of black and white probationary troopers are skewered [sic] as a result of the use

of the two lists required under the Consent Decree and are not comparable for the purpose urged by the plaintiff.

8. Plaintiff was not treated differently than any other probationary trooper.

9. The law is with the defendant and against the plaintiff.

10. If necessary to sustain the judgment herein, any conclusion of law shall be construed to be a finding of fact and any finding of fact, a conclusion of law.

The undersigned United States Magistrate Judge recommends the adoption of this report, findings of fact, and conclusions of law by the United States District Judge.

Dated this 14th day of April, 1993.

/s/ J. Patrick Endsley
J. PATRICK ENDSLEY,
Magistrate Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

HUBBARD LEROY WALKER, Plaintiff, v. STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD, Defendants.	)	CAUSE NO. EV 87 12 C

ENTRY ON PLAINTIFF'S OBJECTIONS

This matter comes before the Court on the objections filed by the plaintiff, Hubbard Leroy Walker ("Walker"), to the Magistrate Judge's Report and Recommendation (the "Report"). The parties have filed their briefs, and the issues raised by Walker's objections are ready to be resolved. For the reasons discussed below, the Court OVERRULES Walker's objections, and ADOPTS the Report.

I.

On April 14, 1993, Magistrate Judge Endsley issued his Report. In the Report, Magistrate Judge Endsley made factual findings and conclusions of law, and held in favor of the defendants on Walker's claim of employment discrimination based on race, which was brought pursuant to 42 U.S.C. §§ 2000e *et seq.* On April 28, 1993, Walker submitted objections to Magistrate Judge Endsley's Report. On August 6, 1993, the defendants filed their

response in opposition to Walker's objections. Walker filed a reply in support of his objections on September 7, 1993.

II.

This case was referred to Magistrate Judge Endsley pursuant to 42 U.S.C. § 2000e-5(f) (5), and Fed. R. Civ. P. 53. As a result, this Court must apply the following standards in addressing Walker's objections to Magistrate Judge Endsley's Report.

Rule 53 provides in pertinent part: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." Although this Court must review Magistrate Judge Endsley's findings of fact with care, as Rule 53 indicates the standard to be applied in making the review is the same as the standard of review the Court of Appeals applies to findings of fact made by a district court. *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988), *cert. denied*, 488 U.S. 1047 (1989). Accordingly, Magistrate Judge Endsley's findings of fact are entitled to deference. *See id.* at 885.[1] Magistrate Judge Endsley's conclusions of law, however, are not entitled to any deference. *See id.*

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[1] The Court notes that much of Walker's briefing and accompanying materials in support of his objections to Magistrate Judge Endsley's Report ask this Court to find error because there was sufficient evidence to support factual findings that favored Walker. As the Court's discussion of the appropriate standard reveals, such an argument provides no basis for finding error.

III.

At trial, Walker advanced four theories of recovery for unlawful racial discrimination. Walker's objections are discussed below with respect to each of his four theories of recovery.

A. WALKER'S DIRECT EVIDENCE THEORY

Walker's direct evidence theory of racial discrimination was based on evidence that negative evaluations of Walker were the product of racial stereotypes. Specifically, Walker argued that the evaluations indicate the following racial stereotypes: (1) that "blacks are not as smart as whites or blacks are mentally deficient;" (2) "black men are oversexed, more sexually attracted to women, particularly white women, and black men have unusual difficulty with long-term monogamy;" and (3) blacks must be "obedient, subservient, and deferential to whites." Pl.'s Trial Br. at 4.

Walker argues that Magistrate Judge Endsley erred by concluding that the evaluations of Walker were not based on racial stereotypes, and argues that Magistrate Judge Endsley committed a legal error by failing to analyze Walker's "direct evidence case . . . under the controlling legal principles." Pl.'s Objections at 1.

Magistrate Judge Endsley made the following discussion and finding of facts in connection with Walker's racial stereotyping argument:

> Walker bases his case almost entirely upon the contents of the monthly evaluation reports. [Walker] never objected to any evaluation in

whole or in part during his tenure. Although he now claims he never read the reports and that they were not discussed with him, the Court does not find his testimony credible. He signed the evaluations which attest that they were read and discussed. His trainer has so testified.

Robert Brookins, B.S., M.S., J.D., Ph.D., Associate Professor of Law, Indiana University School of Law – Indianapolis, was tendered as an expert witness in the field of stereotyping. The Court refused to create such a field of expertise but, in light of his background in labor relations and discrimination, permitted Dr. Brookins to testify on behalf of the plaintiff.

The Witness defined a stereotype as an exaggerated belief concerning a characteristic which exists [in] a group of people and extends beyond a factual basis. Such characteristics may or may not exist in fact.

Working from plaintiff's exhibit 17, a self-serving conclusionary document prepared either by counsel or by the witness, [Walker] attempted to attribute every criticism of his performance in the evaluations to what is described as a racial stereotype. Although Dr. Brookins could characterize certain words used as stereotypical he could not, from the use of such words, determine the motivating force of the statement to be discriminatory. The use of racial stereotype language is based upon probabilities not necessarily on the true intent of the speaker or writer.

Dr. Brookins, who had never heard of a "Bubba" personality, concluded that stereotypical terms are a matter of definition and some stereotypes apply to more than one group of people. A review of the evaluations and the use of words

> and phrases used therein does not indicate a racial bias, just a limited vocabulary.
>
> . . .
>
> The areas where [Walker] is marked as needing improvement are the same areas of weakness shown in high school and Academy transcripts.

Report at 21-23. Walker has not convinced this Court that Magistrate Judge Endsley's factual determination that the evaluations were not the product of racial discrimination is a clearly erroneous finding.

In analyzing a direct evidence claim of racial discrimination, the Court must follow the following legal framework. Once the plaintiff meets his burden of establishing by a preponderance of the evidence that an adverse employment action was based upon the plaintiff's race, to avoid liability the defendant must prove by a preponderance of the evidence that the same employment action would have been taken even if the defendant had not taken into consideration the plaintiff's race. *See Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 568-69 (7th Cir. 1989). In the Report, Magistrate Judge Endsley discussed Walker's direct evidence theory based on allegations of racial stereotyping. Magistrate Judge Endsley held:

> [Walker] . . . failed to prove his "direct evidence theory" of racial discrimination. The acts of the command staff in evaluating [Walker's] performance were not based upon racial stereotyping or other impermissible factors.

Report at 25. Because Magistrate Judge Endsley found Walker had failed to prove his direct evidence case, there

was no need for further legal analysis with respect to that claim.

B. WALKER'S INDIRECT EVIDENCE CASE

A plaintiff may prove employment discrimination based on race by way of indirect evidence. In such circumstances the court employs the burden shifting analysis first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Pilditch v. Board of Educ. of the City of Chicago*, 3 F.3d 1113, 1116 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1065 (1994). Under the *McDonnell Douglas* method, the plaintiff must first establish by a preponderance of the evidence a prima facie case of racial discrimination. *Pilditch*, 3 F.3d at 1116. Once a prima facie case is established, "it is presumed that the [defendant] has discriminated because of race unless [the defendant] can articulate some other, legitimate reason. . . . " *Id.* If the employer offers an explanation, the presumption shifts in favor of the defendant, and the plaintiff bears the burden of demonstrating that the defendant's explanation is a pretext, "and ultimately that the [defendant's] real reason for action was discriminatory." *Id.* After the defendant submits a nondiscriminatory explanation for the adverse action taken against the plaintiff, "[t]he *McDonnell Douglas* framework 'simply drops out of the picture,' " and the focus is on whether the plaintiff has met his "ultimate burden of persuading the trier of fact that he was discriminated against because of [racial discrimination]." *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993)).

In this case, Magistrate Judge Endsley determined that Walker had established a prima facie case of racial discrimination, but also found that "the defendants have established by a preponderance of the evidence a valid nondiscriminatory basis for plaintiff's termination as a probationary employee," and that "[Walker] has failed to establish by a preponderance of the evidence that the reasons stated for his dismissal were pretextual." Report at 25.

Walker objects to Magistrate Judge Endsley's determination that the defendants had a legitimate nondiscriminatory reason for discharging Walker and that Walker failed to establish that the defendants' reason was a pretext for racial discrimination. However, Walker's objections are based solely on an argument that there was evidence at trial which could have supported a contrary holding. Walker does not offer any convincing argument that the findings are clearly erroneous.

C. WALKER'S TWO DISPARATE IMPACT CASES

With respect to Walker's disparate impact cases, Walker argued that he presented statistical evidence that revealed the defendants made racially-motivated employment decisions. Walker argued his evidence revealed that only black employees failed to obtain a permanent position at the conclusion of the probationary period. According to Walker, such evidence on its own establishes a prima facie case of disparate impact racial discrimination, which the defendants failed to overcome. Walker also argued that the statistical disparity and the defendants' use of subjective criteria to evaluate probationary

employees establishes a prima facie case of racial discrimination.

Magistrate Judge Endsley rejected Walker's statistical evidence, and therefore, rejected both of Walker's disparate impact cases based on those statistics. According to Magistrate Judge Endsley:

> The Court finds no merit to [Walker's] "statistical" case. The retainage rates of black and white probationary troopers are skewered as a result of the use of the two lists required under the Consent Decree and are not comparable for the purpose urged by [Walker].

Report at 25. Walker objects to Magistrate Judge Endsley's rejection of Walker's statistical evidence and Magistrate Judge Endsley's failure to conclude that Walker established a prima facie disparate impact case.

Review of the trial judge's assessment of statistical evidence is made under the clearly erroneous standard, and " 'great deference is due the [trial judge's] determination of whether the resultant numbers are sufficiently probative of the ultimate fact in issue.' " *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1045 (7th Cir. 1991) (quoting *Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990, 995 n.6 (7th Cir. 1983)), *cert. denied*, 113 S. Ct. 644 (1992). Here Magistrate Judge Endsley found that Walker's statistics were an unreliable indication of employment discrimination because the statistics were based on the results of employment practices taken pursuant to a consent decree entered in another racial discrimination case. Walker does not present any argument showing that Magistrate Judge Endsley's rejection of the statistical evidence was clearly erroneous. Walker argues only that his statistics established a gross disparity and

therefore were capable of establishing a prima facie case. Walker fails to acknowledge that before statistical evidence can establish a prima facie disparate impact case the fact finder must be convinced of the reliability of the statistical evidence. *See Allen v. Seidman*, 881 F.2d 375, 378 (7th Cir. 1989) ("A statistical analysis must cross a threshold of reliability before it can establish even a prima facie disparate impact). The Court finds that there is no basis for concluding that Magistrate Judge Endsley's rejection of Walker's statistical evidence was clearly erroneous.

IV.

The Court has considered Walker's objections and the reasoning in the report and recommendation for rejecting each of Walker's theories. Because the Court finds no error of law and no clearly erroneous factual finding, the Court OVERRULES Walker's objections and ADOPTS the Report. As a result, judgment shall be entered in favor of the defendants and against the plaintiff, and the case shall be DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 13 day of July, 1994.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

HUBBARD LEROY WALKER, Plaintiff, v. STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD, Defendants.	)	CAUSE NO. EV 87 12 C

JUDGEMENT

A final judgment is entered for the defendants, and against the plaintiff. Plaintiff takes nothing by way of his complaint. This cause is dismissed with prejudice.

Dated: July 13, 1994.

/s/ A. Victoria Thevenow
CLERK
United States District Court
Southern District of Indiana

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 18, 1995.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

HUBBARD L. WALKER, Plaintiff-Appellant, No. 94-2962 vs. STATE OF INDIANA, INDIANA STATE POLICE DEPARTMENT, INDIANA STATE POLICE BOARD, et al., Defendants-Appellees.	)	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division. No. 87 C 12 Larry J. McKinney, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by plaintiff-appellant on July 6, 1995, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

PLAINTIFF'S EXHIBIT 6b

July 1, 1977

FROM:	Lieutenant Norman C. Burnworth PE 284 Commander Evansville District #35
TO:	John T. Shettle Superintendent
SUBJECT:	Narrative Probationary Evaluation Report P/O Hubbard L. Walker PE 3104
APPEARANCE:	P/O Walker is habitually neat and well groomed in uniform and person. He weighed 202 lbs. when weighed this month, which is a reduction from previous months. The department standards is [sic] 190 lbs. for him.
CONDUCT:	P/O Walker is presently being investigated (I 77-066) reference allegations of Improper Conduct or Misconduct and actions involving the Holiday Inn, U.S. 41 North, Evansville, Indiana and Holiday Inn employees and also Holiday Inn employees away from the Holiday Inn. Complaint made by innkeeper Mr. William S. Condis, Holiday Inn, 2508 Highway 41 North, Evansville, Indiana. P/O Walker has involved himself with incidents or situations

	which have been embarrassing to the Holiday Inn, Holiday Inn employees and the Department. His involvement concerns his personal affairs with female employees of the Holiday Inn and also involves other incidents which are related. These occurrences alleged to have occured [sic] during April and May 1977.
JUDGEMENT:	P/O Walker has used good judgement during the course of his duties for this month.
FELLOWSHIP AND ASSOCIATION:	P/O Walker maintains a mannerly and polite attitude when around superiors. He continues his opinion that some members of the Department have not accepted him.
DISCIPLINE:	On his days off June 18th and 19th 1977 he failed to leave adequate information as to his location in the State of Kentucky, with this exception he has been no discipline problem this month.
INITIATIVE SELF-RELIANCE AND RESOURCEFULNESS:	He has made improvements in this area with experience and by gaining some self-confidence.
ALERTNESS AND OBSERVATION:	His activity for this month reflects his alertness and observation.
EFFORT:	For the month of June, he had 45 traffic arrests, 18 warnings, 18 NTR's, 26 police services, 1 accident

	investigated, 15 truck arrests, 7 criminal arrests, 11 interrogation reports, 2 cases taken, 1 case assisted on.
KNOWLEDGE OF PATROL AREA OF ASSIGNMENT:	With time and experience he has become familiar with his assigned patrol areas and has had no problems this period.
PUBLIC RELATIONS:	P/O Walker had 26 police services and also received a letter of commendation for his courtesy's [sic] and professionalism on June 20, 1977 reference investigation of Case 35-4402. He constantly strives to promote his public image.
ABILITY TO MAKE REPORTS:	P/O Walker made one error on June 8, 1977 on uniform traffic ticket, wrong mph bracket marked. On June 23, 1977 omitted first name and middle initial on a NTR. Also on June 20, 1977 he misspelled Vanderburgh and card and also omitted articles recovered and disposition on Case #35-4402. P/O Walker's inability to spell correctly and to properly prepare or complete accurate, required reports is reflected in this area.
WORK ATTITUDE:	He has not missed any duty days this month and worked (2) two hours overtime. He has been prompt reporting for duty and has not complained.

OPERATION AND CARE OF DEPARTMENT EQUIPMENT:	He has operated his commission safely, no complaints or accidents. He keeps it and his equipment in a clean and orderly condition.
PREPARATION AND PRESENTATION OF COURT CASES:	He has not had any traffic or criminal court cases this month.

P/O Walker's job performance has been satisfactory this month. He is being scrutinized closely by his superiors.

Respectfully submitted,

/s/ Norman C. Burnworth
Lt. Norman C. Burnworth
Commander, Evansville
District #35

Exhibit 18-b

SUMMARY COMPARISON OF EVALUATIONS FROM JANUARY 1, 1977: 1/1/77 - 4 /77
(BEFORE EXTENSION OF PROBATION); 5/1/77 - 5/31/77 (MONTH PROBATION WAS EXTENDED;
6/20/77 - 6/26/77 AND 6/26/77 - 6/30/77 (FOLLOWING EXTENSION OF PROBATION)

Section	1/1/77 - 4/30/77	5/1/77 - 5/31/77	6/26/77 - 6/30/77	6/20/77 - 6/26/77
I - Appearance	4 - SATISFACTORY	SATISFACTORY	Improvement Needed	Improvement Needed
II - Conduct	3 - SATISFACTORY 1 - SUPERIOR	Improvement Needed	SATISFACTORY	SATISFACTORY
III - Judgment	1 - SATISFACTORY (in April) 3 - Improvement needed (in Jan., Feb. & March)	SATISFACTORY	SATISFACTORY	SATISFACTORY
IV - Fellowship	1 - SATISFACTORY 3 - SUPERIOR	SATISFACTORY	SATISFACTORY	SATISFACTORY
V - Discipline	4 - SATISFACTORY	SATISFACTORY	Improvement Needed	SATISFACTORY
VI - Initiative	4 - SATISFACTORY	Improvement Needed	SATISFACTORY	SATISFACTORY
VII - Alertness	4 - SATISFACTORY	SATISFACTORY	SATISFACTORY	SATISFACTORY
VIII - Effort	4 - SATISFACTORY	SATISFACTORY	SUPERIOR	SATISFACTORY
IX - Knowledge of Patrol Area	4 - SATISFACTORY	SATISFACTORY	SATISFACTORY	SATISFACTORY
X - Knowledge of Law	4 - SATISFACTORY	SATISFACTORY	SATISFACTORY	SATISFACTORY
XI - Public Relations	4 - SATISFACTORY	SATISFACTORY	SATISFACTORY	SATISFACTORY
XII - Reports	4 - Improvement Needed	Improvement Needed	Improvement Needed	Improvement Needed
XIII - Work Attitude	4 - SATISFACTORY	Improvement Needed	SATISFACTORY	SATISFACTORY
XIV - Equipment	4 - SATISFACTORY	SATISFACTORY	SATISFACTORY	SATISFACTORY
XV - Court Preparation	4 - SATISFACTORY	SATISFACTORY	SATISFACTORY	SATISFACTORY

1/1/77 - 4/30/77 Only mental ability was referred to until probation extension decision (in late May 1977) then after Defendants added DEMEANOR TOWARD OPPOSITE SEX to May 25, 1977 memo (that memo was done before the Condis complaint was made).